

VERIFIED STATEMENT
OF
JAMES ZOLNIEREK

(PUBLIC VERSION)

TELECOMMUNICATIONS DIVISION
ILLINOIS COMMERCE COMMISSION

DOCKET NO. 01-0466

August 10, 2001

Section I: Statements of Identification and Purpose

Q. Please state your name and business address.

A. My name is James Zolnierrek and my business address is 527 East Capitol Avenue, Springfield, Illinois 62701.

Q. By whom are you employed and in what capacity?

A. I am employed by the Illinois Commerce Commission as a Senior Policy Analyst in the Telecommunications Division.

Q. Please state your education background and previous job responsibilities.

A. I earned my Bachelors of Science degree in mathematics from Michigan State University in 1990. I also earned from Michigan State University both a Master of Arts degree in economics in 1993 and a Doctor of Philosophy degree in economics in 1996.

I have been a Visiting Professor of Economics in the Department of Economics at both the University of Nebraska and Arizona State University. I have taught a variety of economics courses to both graduate and undergraduate students at both of these institutions and at Michigan State University while I completed my

24 doctoral studies. Prior to joining the Illinois Commerce Commission I was
25 employed by the Federal Communications Commission ("FCC") in the Common
26 Carrier Bureau, Industry Analysis Division.

27
28 **Q. What is the purpose of your testimony in this proceeding?**

29
30 A. The purpose of my testimony is to address the dispute between Illinois Bell
31 Telephone Company d/b/a Ameritech Illinois ("Ameritech") and XO Illinois, Inc.
32 ("XO") over terms, conditions, and rates for the exchange of traffic subject to the
33 reciprocal compensation provisions of Section 251(b)(5) of the
34 Telecommunications Act of 1996 ("1996 Act").

35
36 **Section II: Staff Recommendation**

37
38 **Q. What is your recommendation for resolving the dispute between Illinois**
39 **Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") and XO**
40 **Illinois, Inc. ("XO") over terms, conditions, and rates for the exchange of**
41 **traffic subject to the reciprocal compensation provisions of Section**
42 **251(b)(5) of the Telecommunications Act of 1996 ("1996 Act")?**

43
44 A. There are a number of steps the Commission must take in order to resolve this
45 issue. First, I recommend that the Commission require Ameritech to immediately
46 determine whether it wishes to adopt the reciprocal compensation rate caps
47 established by the Federal Communications Commission (FCC) in its ISP-Bound

48 Traffic Order released on April 27, 2001.¹ I recommend that Ameritech be
49 required to commit to its choice until such time as the Commission determines
50 that changes in either federal or state regulations warrant departure from this
51 commitment. The additional steps I recommend the Commission take to resolve
52 this dispute are contingent on the choice Ameritech makes.

53
54 In the event that Ameritech elects to forgo the FCC's reciprocal compensation
55 rate caps, I recommend the Commission adopt the XO language concerning the
56 terms, conditions, and rates for reciprocal compensation of traffic subject to the
57 reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act in this
58 interconnection agreement. As indicated in the testimony of XO Witness
59 Kinkoph, the rates, terms, and conditions for reciprocal compensation
60 recommended by XO are similar to the language in the arbitrated interconnection
61 agreement between Ameritech and Focal Communications Corporation of Illinois
62 ("Ameritech-Focal Arbitrated Interconnection Agreement").² I also recommend in
63 the event that Ameritech elects to forgo the FCC's reciprocal compensation rate

¹ Federal Communications Commission, Order on Remand and Report and Order In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic ("ISP-Bound Traffic Order"), released April 27, 2001 (CC Docket Nos. 96-98 and 99-68).

² Verified Statement of XO Witness Douglas W. Kinkoph at 5. See also Verified Reply Testimony of Douglas W. Kinkoph at 3 where Mr. Kinkoph indicates "To be clear, XO's proposed language, attached to its petition as Exhibit E, is taken directly from the Focal language, the only modification is the deletion of one sentence in Section 4.7." State of Illinois, Illinois Commerce Commission, Arbitration Decision In the Matter of Focal Communications Corporation of Illinois Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois, by Order of the Commission May 8, 2000 (ICC Docket No. 00-0027) and State of Illinois, Illinois Commerce Commission, Order In the Matter of Focal Communications Corporation of Illinois and Illinois Bell Telephone Company d/b/a Ameritech Illinois Joint Petition for Review of an Arbitration Interconnection Agreement, by Order of the Commission October 4, 2000 (ICC Docket No. 00-0526).

64 caps, inclusion in this interconnection agreement of rates, terms, and conditions
65 for ISP-bound traffic similar to those in the Ameritech-Focal Arbitrated
66 Interconnection Agreement.

67
68 In the event that Ameritech elects to adopt the FCC's reciprocal compensation
69 rate caps, I recommend the Commission require the parties to draft new contract
70 language that comports with this election. Such language should adhere to the
71 following guidelines. First, rates, terms, and conditions for reciprocal
72 compensation of traffic subject to the reciprocal compensation provisions of
73 Section 251(b)(5) of the 1996 Act in this interconnection agreement will be set at
74 the rate caps prescribed by the FCC's ISP-Bound Traffic Order.³ As above, I
75 also recommend inclusion in this interconnection agreement of the rates, terms,
76 and conditions for ISP-bound traffic. In the event Ameritech elects the FCC's
77 reciprocal compensation rate caps, the parties must draft new language that
78 describes the explicit prescriptions for measurement and rating of ISP-bound
79 traffic found in the FCC's ISP-Bound Traffic Order.

³ "Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of \$.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at \$.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at \$.0007/mou. ... For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling." FCC ISP-Bound Traffic Order at ¶ 8.

Section II: Summary of Relevant Portions of the FCC's ISP-Bound Traffic Order

Q. Please summarize the conclusions reached by the FCC in its ISP-Bound Traffic Order in regard to the Illinois Commerce Commission's jurisdiction over reciprocal compensation rates for ISP-bound traffic.

A. The regulations created by the FCC preempt the Commission's ability to address the proper compensation for telecommunications delivered to Internet service providers. The FCC concludes that "...Congress excluded from the 'telecommunications' traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs" and that "traffic delivered to an ISP is predominately interstate access traffic subject to section 201 of the Act."⁴ Consequently, the FCC determined that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic ... state commissions will no longer have authority to address this issue."⁵ The Commission explicitly recognized the FCC's preemptive ruling when it recently dismissed the proceeding in Docket No. 00-0555 concerning the establishment of rules for reciprocal compensation for Internet service provider-bound traffic. The Commission indicated in its ruling that "We agree ... that the FCC has recently and explicitly pre-empted our authority over the subject matter at hand."⁶

⁴ Id. at ¶ 3.

⁵ Id. at ¶ 82.

⁶ State of Illinois, Illinois Commerce Commission, Order In the Matter of Illinois Commerce Commission On Its Own Motion Establishing Rules for Reciprocal Compensation for Internet Service Provider-bound Traffic, by Order of the Commission July 25, 2001 (ICC Docket No. 00-0555) at 3.

102
103 **Q. Please summarize the conclusions reached by the FCC in its ISP-Bound**
104 **Traffic Order in regard to competing carriers' ability to opt into the ISP-**
105 **bound reciprocal compensation rate provisions of interconnection**
106 **agreements.**

107
108 A. Closely related to the FCC's preemption ruling, is the FCC's determination that
109 "carriers may no longer opt into an existing interconnection agreements with
110 regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i)
111 applies only to agreements arbitrated or approved by state commissions
112 pursuant to section 252; it has no application in the context of an intercarrier
113 compensation regime set by this Commission pursuant to section 201."⁷

114
115 **Q. Please summarize the ISP-bound reciprocal compensation rate guidelines**
116 **established by the FCC in its ISP-Bound Traffic Order.**

117
118 A. Having preempted states authority to determine reciprocal compensation rates
119 for ISP-bound traffic the FCC, invoked its jurisdictional authority over these rates,
120 establishing guidelines for incumbent local exchange carriers (ILECs), such as
121 Ameritech, to follow in establishing rates for reciprocal compensation of ISP-
122 bound traffic. Rather than setting a specific rate, the FCC gave ILECs a choice.
123 ILECs may elect to exchange ISP-bound traffic at rate caps established by the

⁷ FCC ISP-Bound Traffic Order at ¶ 82. (Footnotes omitted.)

FCC (outlined above) or in the absence of such an election the ILEC may exchange ISP-bound traffic at “state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.”⁸ The FCC specified that “ILECs may make this election on a state-by-state basis.”⁹

Q. Please summarize the reciprocal compensation rate guidelines established by the FCC in its ISP-Bound Traffic Order for traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act.

A. In addition to establishing guidelines for ILECs to follow in setting reciprocal compensation rates for ISP-bound traffic, the FCC imposed reciprocal compensation rate guidelines for traffic subject to the reciprocal compensation provisions of Section 251(b)(5) that are contingent on whether or not the ILEC adopts the FCC ISP-bound traffic reciprocal compensation rate caps. The FCC specified that the rate caps apply “... *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate.”¹⁰ Alternatively, the FCC directed that if the ILEC does not elect the FCC’s reciprocal compensation rate caps then both traffic subject to the reciprocal compensation provisions of section 251(b)(5) and ISP-bound traffic be exchanged at “the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.”¹¹

⁸ Id. at ¶ 89. (Footnote omitted.)

⁹ Id. at footnote 179.

¹⁰ Id. at ¶ 89.

¹¹ Id. at ¶ 89.

Section III: Support For Staff Recommendation

Q. What limits does the FCC's ISP-Bound Traffic Order place on XO's ability to opt into the Ameritech-Focal Arbitrated Interconnection Agreement?

A. As indicated above, the FCC's order eliminates XO's ability to opt into the provisions of the Ameritech-Focal Arbitrated Interconnection Agreement governing rates for ISP-bound traffic. Ameritech recognized this restriction in its response to XO's request to opt into the Ameritech-Focal Interconnection Agreement and XO's witness has concurred.¹² Additional restrictions will be conditional on whether Ameritech elects to invoke the FCC rate reciprocal compensation rate caps.

Q. Does the FCC's ISP-Bound Traffic Order place additional limits on XO's ability to opt into the Ameritech-Focal Arbitrated Interconnection Agreement if Ameritech elects the rate caps?

¹² "...by operation of law, XO may not opt into the terms and provisions for ISP compensation in the Focal Agreement because the recent FCC order ruled that such ISP compensation provisions are outside the permissible scope of Section 252(i) as of April 18, 2001." Ameritech letter to XO dated June 18, 2001 filed as Appendix D to the Petition for Arbitration In the Matter of XO Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Petition"). "One portion of that order prohibits carriers from using Section 252(i) to opt into the ISP reciprocal compensation provisions of existing agreements." Verified Statement of Witness Douglas W. Kinkoph on Behalf of XO at 3. "

163 A. No. Currently, the Ameritech-Focal Arbitrated Interconnection Agreement
164 provides for reciprocal compensation rates that are the same for both ISP-bound
165 traffic and traffic subject to the reciprocal compensation provisions of section
166 251(b)(5) of the 1996 Act. If Ameritech elects to invoke the FCC rate caps then
167 rates for such traffic would no longer be equivalent. That is, neither XO nor
168 Ameritech would be permitted under the FCC regulations to charge termination
169 fees for ISP-bound traffic exceeding existing volumes plus growth adjustments
170 permissible under the FCC's regulations.¹³ Although I am not an engineer, there
171 appears to be no evidence to suggest that, in the event that the companies
172 accept the FCC's proxy methodology for measuring ISP-bound traffic, such
173 separation would alter the compensation-related terms or physical
174 interconnection between the networks referenced by Ameritech Witness Panfil.¹⁴
175 Under such a circumstance (i.e., acceptance of the FCC's proxy methodology)
176 there is no evidence that anything other than making a conforming revision to
177 compensation schedules and the additional step of applying the FCC's simple
178 proxy formula would be necessary.¹⁵
179
180 In the event that the companies elect to measure ISP-bound traffic directly, then
181 changes to compensation terms or physical interconnection between the

¹⁴ See Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 20.

¹⁵ Ameritech expresses concern that, if it elects the FCC's reciprocal compensation rates, the carriers it interconnects with will be able to choose between accepting rates equal to the FCC rate caps and "state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts." See *Id.* at 17. In the event that Ameritech adopts the FCC's rate caps for ISP-bound traffic the FCC has imposed rate guidelines on 251(b)(5) traffic terminated by Ameritech. There is no reason that, consistent with past practice, carriers interconnected with Ameritech should not "mirror" the ILECs rates. Such "mirroring" rules are grounded in pragmatic and economically sound policy that is fully supported by Staff.

182 networks, as illustrated by Mr. Panfil's testimony, may be necessary. It is my
183 understanding that carriers often interconnect their networks in a manner that
184 allows identification of, and, therefore, direct measurement of different classes of
185 traffic (e.g., interconnection is sometimes configured to separate traffic subject to
186 Section 252(b)(5) from interLATA toll traffic).

187
188 However, the FCC's establishment of a proxy measurement is highly indicative of
189 the fact that the FCC envisioned no such separation.¹⁶ Additionally, as the FCC
190 indicates, the solutions adopted in the ISP-Bound Traffic Order are "...interim
191 steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic
192 while we consider the broader issue of intercarrier compensation..."
193 Reprovisioning of physical interconnection would impose large costs for carriers
194 with contracts containing change of law provisions and for carriers renegotiating
195 expiring contracts. I believe that by adopting a measurement proxy methodology
196 the FCC revealed its intent to avoid imposing the costs required for such
197 reprovisioning on interconnected carriers.

198
199 For the foregoing reasons, I do not believe that, in the event Ameritech invokes
200 the FCC reciprocal compensation rate caps, compliance with the regulations
201 established in the FCC's order requires any change from the terms and
202 conditions for interconnection found in the Ameritech-Focal Arbitrated

¹⁶ That is, if networks are interconnected in manners that allow separation of traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act and ISP-Bound traffic, then there would be no need for the proxy methodology adopted in the FCC's ISP-Bound Traffic Order.

Interconnection Agreement other than a conforming modification of the rate schedule and an additional step of applying the FCC's simple proxy formula.

Q. The FCC's ISP-Bound Traffic Order does not speak directly to whether carriers need to reconfigure their interconnection arrangements as a result of this Order. Should the Commission permit reconfiguration and subsequent renegotiation of all reciprocal compensation terms and conditions?

A. No. As explained above, I do not believe renegotiation of all reciprocal compensation terms and conditions, based solely on the need to measure ISP-bound traffic directly, is consistent with the FCC's ISP-Bound Traffic Order. Moreover, there is no indication that such a change would produce net economic benefits to society or further the pro-competitive objectives of the 1996 Act. As discussed above, such a change likely would require costly changes to the compensation terms and physical interconnection arrangements between carriers' networks. No evidence has been presented that would indicate that such costs would be trivial or that those costs would exceed any benefits to be gained from direct measurement of ISP-bound traffic, as opposed to use of the FCC's proxy measurements.

The Commission recently ruled on a similar transition. In evaluating whether the Commission should require Ameritech to adopt a system to bill wireless carriers

for tandem transport based on actual tandem mileage rather than an industry median figure, the Commission concluded that “It would seem ... that Ameritech is capable of implementing such a system, however, the record is not sufficient to determine whether Ameritech should implement such a system. Such a determination would require a balancing of the costs involved and the supposed resulting benefit.”¹⁷ Ameritech itself argued there that “...If the Commission decides, in this or any docket, to require Ameritech Illinois to institute a system of direct measuring actual transport miles for wireless carriers, it should be because it concludes the benefit outweighs the cost...”¹⁸ Therefore, the Commission has concluded in the past, and Ameritech has concurred, that implementation costs must be considered when structural changes are proposed, even if such changes would result in rates more reflective of actual costs.

Based on the evidence presented in the current proceeding, the Commission cannot conclude that the benefits of direct measurement of ISP-bound traffic outweigh the costs. Therefore, in the absence of any evidence that its previous ruling was in error or that the circumstances in this instance are appreciably different, the Commission should not require carriers to alter their interconnection agreements in order to directly measure ISP-bound traffic.

¹⁷ State of Illinois, Illinois Commerce Commission, Arbitration Decision In the Matter of Verizon Wireless Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois (“Ameritech-Verizon Wireless Arbitration Decision”), by Order of the Commission May 1, 2000 (ICC Docket No. 01-0007) at 20.

¹⁸ Ameritech Illinois Post-Hearing Reply Brief In the Matter of Verizon Wireless Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois, by Order of the Commission May 1, 2000 (ICC Docket No. 01-0007) at 14.

245
246 **Q. What limits does the FCC's ISP-Bound Traffic Order place on XO's ability to**
247 **opt into the Ameritech-Focal Arbitrated Interconnection Agreement if**
248 **Ameritech does not elect the FCC's rate caps?**

249
250 A. If Ameritech does not elect the caps, then rates for traffic subject to the reciprocal
251 compensation provisions of Section 251(b)(5) and for ISP-bound traffic will be
252 identical. Measurement of the individual traffic types therefore becomes a non-
253 issue. Consequently, in the event Ameritech does not elect the FCC reciprocal
254 compensation rate caps, there is no evidence to indicate that additional limits will
255 be placed on XO's ability to opt into the Ameritech-Focal Arbitrated
256 Interconnection Agreement.

257
258 Ameritech Witness Panfil asserts that terms and conditions other than the rates
259 for ISP-bound traffic are legitimately related to other reciprocal compensation
260 terms and conditions in the contract.¹⁹ However, this assertion appears to be
261 based solely on the assumption that ISP-bound traffic and traffic subject to the
262 reciprocal compensation provisions of Section 251(b)(5) do not share the same
263 rate. For example, he states, "The parties therefore must come to some
264 understanding of how the parties will jurisdictionalize the ISP traffic, and
265 properly rate the different classes of traffic."²⁰ In reality, such concerns may arise
266 only if Ameritech elects the FCC's reciprocal compensation rate caps. To this

¹⁹ See Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 20.
²⁰ Id. at 20 and 21.

267 juncture, Ameritech has made no such election. Such concerns, therefore, are
268 misplaced and irrelevant.

269
270 **Q. Mr. Panfil contends that, since the FCC's ISP-Bound Traffic Order alters the**
271 **rates, terms, and conditions for "non-local" ISP-bound traffic, the**
272 **renegotiation of all reciprocal compensation terms and conditions in**
273 **current agreements will be necessary. Please assess this contention.**

274
275 **A.** Mr. Panfil provides no credible evidence or argument to support this assertion.
276 First, he fails to explain, in the event Ameritech does not elect the FCC reciprocal
277 compensation rate caps, how such rates, terms, and conditions would change.
278 Second Mr. Panfil fails to show how any of these changes would be inconsistent
279 with rates, terms, and conditions in the Ameritech-Focal Arbitrated
280 Interconnection Agreement. Thus, Staff cannot concur with his assessment.

281
282 **Q. You recommend that XO be allowed to opt into the Ameritech-Focal**
283 **Arbitrated Interconnection Agreement, but you acknowledge that the FCC's**
284 **ISP-Bound Traffic Order eliminates XO's ability to opt into the provisions of**
285 **the Ameritech-Focal Arbitrated Interconnection Agreement governing rates**
286 **for ISP-bound traffic. Is your recommendation consistent with the FCC's**
287 **order?**

289 A. If Ameritech had elected the caps, then the rates, terms, and conditions for
290 reciprocal compensation of ISP-bound traffic established by the FCC's ISP-
291 bound traffic order could not mirror those in the Ameritech-Focal Arbitrated
292 Interconnection Agreement. Because, under these circumstances, the rates,
293 terms, and conditions for reciprocal compensation of ISP-bound traffic in the
294 Ameritech-Focal Arbitrated Interconnection Agreement would be inconsistent
295 with the FCC's rate caps; the FCC has clearly prohibited a carrier's ability to opt-
296 in to such rates, terms, and conditions. Therefore, it is clear that the FCC could
297 not both allow ILECs to elect rate caps and allow carriers interconnected with
298 these ILECs to maintain their preexisting ability to opt-in to agreements.

299
300 As explained above, however, if Ameritech does not elect the FCC's reciprocal
301 compensation rate caps, then the rates, terms and conditions for reciprocal
302 compensation of ISP-bound traffic established by the FCC's ISP-bound traffic
303 order may mirror those in the Ameritech-Focal Arbitrated Interconnection
304 Agreement. In such a case, there is no conflict between the rates, terms and
305 conditions for reciprocal compensation of ISP-bound traffic in the Ameritech-
306 Focal Arbitrated Interconnection Agreement and the rates, terms, and conditions
307 established in the FCC's ISP-Bound traffic order. Because Ameritech has not
308 elected the FCC's reciprocal compensation rate caps, the rates, terms and
309 conditions in the Ameritech-Focal Arbitrated Interconnection Agreement are
310 consistent with the FCC's ISP-Bound traffic order. XO should be able to adopt
311 those rates, terms and conditions and include them in the contract.

312

313 This conclusion is influenced by my understanding that, absent their inclusion in
314 this agreement, the rates, terms and conditions governing reciprocal
315 compensation of ISP-bound traffic between the carriers will not be entered in any
316 tariff, interconnection agreement or other document available for reference.
317 Because this contract clearly depends on these rates, terms and conditions, their
318 inclusion will resolve ambiguities that would arise from their absence.

319

320 **Q. Does the FCC's ISP-Bound Traffic Order impose any deadline or other time**
321 **limits on Ameritech's election of the FCC reciprocal compensation rate**
322 **caps?**

323

324 A. No.

325

326 **Q. In light of your answer, what is the basis for your recommendation that this**
327 **Commission require an immediate determination by Ameritech?**

328

329 A. If Ameritech elects the FCC's reciprocal compensation rate caps, the rates at
330 which traffic is exchanged will be reduced significantly.²¹ There can be no
331 dispute that such changes will materially affect the business plans of Ameritech's
332 competitors. Therefore, it is absolutely essential that carriers understand
333 precisely what choice Ameritech has made. The failure on Ameritech's part to

make a timely decision necessarily will increase uncertainty and, therefore, the market risk experienced by XO and Ameritech's other competitors. This amounts to anti-competitive behavior which the Commission should not countenance.

Q. You have indicated that Ameritech has not elected the FCC's reciprocal compensation rate caps. Is there any evidence that Ameritech may elect the rate caps in the future?

A. Yes. In Ameritech's response to the Petition, Ameritech indicates "...both parties' proposals agree that until such time (**if any**) as Ameritech Illinois makes that election, whatever rates the parties pay each other for terminating 251(b)(5) traffic will also apply to ISP-bound traffic that the parties exchange."²² Similarly, Ameritech Witness Panfil indicates "Under the FCC's Order, however, Ameritech Illinois is required to exchange ISP-bound traffic at the same rates as 251(b)(5) traffic until such time, **if any**, as Ameritech Illinois chooses to avail itself of the rate caps that the FCC's Order establishes for ISP-bound traffic."²³ In response to Staff Data Request JZ-IBT 1.1, Ameritech indicates that "[a]s of the date of this response, Ameritech Illinois has not offered to exchange section 251(b)(5) traffic at a rate equal to the rate caps adopted by the FCC or ISP-bound traffic, and accordingly has not exercised its right to exchange ISP-bound traffic at the rate

²¹ In fact, the FCC indicates that "[b]oth the rate caps and volume limitations reflect our view that LECs should begin to formulate business plans that reflect decreased reliance on revenues from intercarrier compensation..."

²² Ameritech Illinois Response In the Matter of XO Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with

caps adopted by the FCC.”²⁴ These statements illustrate very clearly that Ameritech believes that it need not make a decision on whether it will or will not elect the FCC’s reciprocal rate caps, has some vested authority to withhold such information from its competitors, and can reverse its position and elect the caps at any moment. Staff recommends that the Commission preclude Ameritech from engaging in what is clearly anticompetitive behavior.

Section IV: Analysis of Ameritech’s Proposal

Q. Ameritech has proposed that the Commission approve a new bifurcated rate structure to apply to reciprocal compensation for both ISP-bound traffic and traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act. Is this consistent with the intent of the FCC’s ISP-Bound Traffic Order?

A. No. Under this Order, if Ameritech declines to adopt the FCC reciprocal compensation rate caps, Ameritech must exchange both ISP-bound traffic and traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act at the “the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.”²⁵ Ameritech currently has

Illinois Bell Telephone Company d/b/a Ameritech Illinois (“Response”), (ICC Docket No. 01-0466) at 4. Emphasis added.

²³ Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 15. Emphasis added.

²⁴ Ameritech’s response to JZ-IBT 1.1 of Staff Data Requests JZ IBT 1.1-1.3 (attached as Appendix

B).

²⁵ Id. at ¶ 89.

Commission-approved tariffs for reciprocal compensation rates for traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act. These are the tariffs that should apply.

In arbitrating the Ameritech-Focal Interconnection Agreement (Docket No. 00-0027), the Commission considered whether Ameritech's tariffed rate was applicable to ISP-bound traffic. The Commission did not consider whether this rate was appropriate for non-ISP-bound local traffic. The question of the appropriate reciprocal compensation rate for ISP-bound traffic examined in the Focal-Ameritech arbitration caused the Commission to initiate a broader rule-making proceeding to examine this question. This rule making was initiated expressly to examine reciprocal compensation rates for ISP-bound traffic, and this rulemaking proceeding (Docket No. 00-0555) subsequently was dismissed as a result of the preemptive action taken by the FCC in its ISP-Bound Traffic Order. In each of these proceedings the question examined concerned the appropriate rate for ISP-bound traffic. The FCC's pre-emptive action no longer permits the Commission to address this issue.

In my opinion, Ameritech's proposal is an attempt to circumvent the FCC's decision. In fact, Ameritech frankly states that "Section 5.0 of the proposed Appendix Reciprocal Compensation attacks head on, and solves, precisely the over-compensation problem recognized by Staff and the Commission in Docket

00-0027..."²⁶ That is, Ameritech requests that the Commission adopt its proposal which "attacks head on" the ISP-bound traffic concerns at issue in the Ameritech-Focal arbitration. This is quite clearly inconsistent with the FCC's direction.

Q. Does the FCC's rule prevent this Commission from setting, updating, or correcting reciprocal compensation rates for traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act?

A. Only if an ILEC such as Ameritech elects the FCC's reciprocal compensation rate caps. Since the ILEC must then offer to exchange traffic subject to Section 251(b)(5) of the 1996 Act at these same rates, the Commission effectively is precluded from setting reciprocal compensation rates for this traffic.²⁷

In contrast, if Ameritech does not elect the FCC's rate caps, it is well within the Commission's authority (and consistent with FCC directives in the ISP-Bound Traffic Order) for this Commission to establish reciprocal compensation rates for traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act. However, as indicated above, I believe it would be inconsistent with the direction and intent of the FCC's ISP-Bound Traffic Order for this Commission to revise rates expressly for the purposes of remedying perceived problems with reciprocal compensation rates for ISP-bound traffic.

²⁶ Response at 19.

418

419 **Q. Ameritech Witness Panfil has testified “Ameritech Illinois’ current**
420 **reciprocal compensation rates in Illinois (and also the rates of all other**
421 **local service providers (i.e., CLECs and wireless carriers) that use those**
422 **same rates under the FCC’s ‘symmetrical rates’ rule) are inconsistent with**
423 **the requirement that they be ‘structured consistently with the manner that**
424 **the carriers incur those costs.’ Given the wide variation in average hold**
425 **times among all of the local service providers that use Ameritech Illinois’s**
426 **rates, a rate structure that recovers per-call setup costs on a per-minute**
427 **basis is not consistent with the FCC rule.” Please comment on these**
428 **assertions.**²⁸

429

430 **A.** Pricing in all industries must rely on some degree of averaging. The cost of
431 developing separate estimates for every unique circumstance associated with
432 provision of a network element or service would dwarf the actual costs of
433 providing such services. For example, the actual cost for a specific loop will
434 depend on the length of the loop, which neighborhoods the loop passes through
435 and serves, the types of streets or terrain the loop pass under or over, whether
436 the weather was poor when the loop was installed thereby requiring extra labor
437 efforts at installation, and so many other factors that it is infeasible to determine a
438 precise individual cost for each loop. Taken to extremes, no rate for any
439 Ameritech element or service is cost based. Nor for that matter is virtually any

²⁷

The FCC’s ISP-Bound Traffic Order does not make it clear whether CLECs must accept the

price in any market. Cost based pricing is inherently a relative concept. Some degree of averaging is almost always warranted in developing cost estimates, whether averages are constructed by customer class (e.g., residential v. business), element (e.g., loop v. port) or some other measure. The degree of deaveraging of prices will, therefore, be primarily dependent on the costs of establishing deaveraged cost estimates and prices weighed against the inherent benefits of prices that better reflect costs.

As Ameritech notes in its Response to XO's Petition for Arbitration ("Response"), "[c]urrent reciprocal compensation rates in Illinois, while theoretically designed to compensate Ameritech Illinois and interconnected CLECs for the costs they incur to transport and terminate calls, were calculated by means of a method (described below) that averaged the duration of all calls to which reciprocal compensation was applied. As a result, the reciprocal compensation charge for any individual call may be imprecise. This has always been true. At the time when the averaging was performed, however (i.e., when the current rates were calculated), reciprocal compensation charges in the aggregate were not significantly imprecise, because the average call duration that was used was a true average of the universe of calls as it then existed."²⁹ This statement implicitly, if not explicitly, indicates Ameritech's view that deaveraging has not been cost effective in the past. Ameritech goes on to note, however, that "[S]ubsequently, however, there have been dramatic changes in call durations for

ILECs offer. This issue is addressed below.

²⁸ Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 11 and 12.

certain categories of calls---changes that this Commission has explicitly recognized. As a result, continued use of current reciprocal compensation rates – based as they are on an average call duration that does not fit the profile of the traffic on today’s local exchange network – yields the following consequences: First, the intercarrier compensation charge for any individual call is more apt than before to be imprecise, and by a wider margin. Second, the charges assessed by (or paid by) any individual carrier in the aggregate are now – unlike before – almost certain to deviate – dramatically for some carriers – from actual termination costs.”³⁰

Both Ameritech’s Response and Mr. Panfil’s testimony repeatedly cite changes in traffic patterns resulting from ISP-bound calling as the primary support these assertions.³¹ They reveal Ameritech’s view that deaveraging is now cost effective primarily because of the advent and growth of ISP-bound traffic. As indicated above, this is precisely the problem the FCC’s ISP-Bound Traffic Order relieved this Commission from addressing.

²⁹ Response at 10.

³⁰ Id. at 10 and 11.

³¹ For example, Ameritech indicates in the Response that “[w]hile **ISP-bound traffic is the most dramatic example**, the point applies generally to all traffic that is subject to reciprocal compensation rates: The current rate structure yields non-cost-based compensation for an enormous percentage of individual calls, because it overcompensates for short calls (by undercharging for set-up costs.)” Response at 12. (Emphasis added.) Mr. Panfil similarly indicates that “The huge disparity in traffic characteristics results from the opportunity that CLECs have to selectively market their services to particular types or classes of customers. Under the current rate structure for reciprocal compensation, **customers such as providers of Internet access service**, providers of chat line services, and businesses offering work-at-home access to their corporate networks, all of which generate incoming calls with hold times substantially longer than typical local calls, are particularly attractive customers for competitive local service providers because the compensation paid on those types of calls significantly exceeds the cost incurred.” Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 9 and 10. (Emphasis added.)

478

479 **Q. Do you recommend that the Commission institute a bifurcated rate**
480 **structure for traffic subject to the reciprocal compensation provisions of**
481 **Section 251(b)(5) of the 1996 Act in this arbitration?**

482

483 A. No. This Commission was investigating reciprocal compensation rates in Docket
484 No. 00-0555 to determine if, given the advent and continuing growth of ISP-
485 bound calling, reciprocal compensation rates should be deaveraged. The FCC
486 has preempted the Commission's ability to address this question.

487

488 Ameritech's request actually seeks to push the inquiry one step further.
489 Ameritech actually is requesting that the Commission determine whether
490 changes in non-ISP-bound traffic patterns (changes instigated by factors which
491 Ameritech itself relegates to secondary roles) necessitate a revision of reciprocal
492 compensation rates. In what seems to be a total contradiction of their basic
493 position, Ameritech asserts, "Ameritech Illinois is not asking the Commission to
494 decide anything about ISP-bound calls. Rather, Ameritech Illinois is asking the
495 Commission to adjust the rate structure for reciprocal compensation on 251(b)(5)
496 calls including, first and foremost, regular local voice calls..."³²

497

498 It is clear that a preponderance of the evidence -- and I believe all of the
499 statistical evidence -- presented by Ameritech concerns changes in traffic

³²

Response at 15.

patterns resulting from ISP-bound calling. Barring a few anecdotal statements made by Ameritech, there is no evidence that secondary factors are a sufficient reason for this Commission to consider revising its reciprocal compensation structure.

Q. Ameritech cites past Staff support for a bifurcated rate structure.³³ Is Staff changing its position?

A. Absolutely not. The passage Ameritech cites culminates in the phrase, “[t]hus, Ameritech is overcompensating...for the cost of an ISP call when using the currently structured reciprocal compensation rate.”³⁴ Once again Ameritech cites evidence of a solution, endorsed by Staff, to address issues associated with reciprocal compensation rates for ISP-bound traffic. As I have repeatedly emphasized, the FCC’s Order preempts the Commissions’ authority to address these issues.

Staff of course supports cost based pricing whenever the societal benefits outweigh the costs. Staff fully acknowledges that moving to the properly set bifurcated rates would yield societal benefits. Should Ameritech provide sufficient and persuasive evidence on traffic patterns for non-ISP-bound traffic, and the relative values of societal costs and benefits associated with moving to

³³ Id. at 12.
³⁴ Id.

bifurcated rates, Staff may revise its position and support examination of rates in a broader proceeding.

Q. Do you recommend the Commission institute a broader proceeding to investigate implementation of a bifurcated rate structure for non-ISP-bound traffic?

A. It is not Staff's recommendation at this time that the Commission initiate a proceeding to investigate the adoption of bifurcated rates. Ameritech has presented no evidence that, in the absence of ISP-bound traffic issues, such a proceeding would yield benefits in excess of costs. However, as stated above, if Ameritech provides persuasive evidence in this proceeding concerning changes in non-ISP bound traffic patterns and associated costs, Staff reserves the right to change its position on this question.

Ameritech Witness Panfil's testimony indicates that Ameritech anticipated Staff's concerns regarding these issues. Mr. Panfil's testimony contains the question "What if Staff were to take the position that while Ameritech Illinois's proposal – the bifurcated rates in particular – has merit, the Commission should consider the proposal in a proceeding in which all CLECs can participate, instead of this proceeding."³⁵ This question is posed because it is clear that this issue will have dramatic effects on those companies most likely to compete with Ameritech,

³⁵ Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 24.

CLECs and wireless carriers. Staff cannot concur with Mr. Panfil when he suggests that "...Ameritech's core proposal, the bifurcated rates, is really, a rather simple proposal, and it can and should be dealt with thoroughly and fairly in this proceeding."³⁶ Staff certainly does not recommend that Ameritech's proposal to bifurcate rates be instituted in this arbitration.

Rather, if the Commission decides to examine a bifurcated rate structure, it must do so in a broader proceeding. Ameritech's proposed solution would alter the reciprocal compensation construction in a manner that, as explained below, decreases Ameritech's business costs at the expense of its competitors. Such a step, if warranted, clearly would need to be thoroughly investigated.

Q. Ameritech Witness Panfil indicates in his reply testimony that "...what Ameritech Illinois is proposing is undeniably superior to what we have in place now."³⁷ Please evaluate this assertion.

A. It is common knowledge in this industry that ILECs, such as Ameritech have large traffic imbalances with CLECs and other wireless carriers. Typically ILECs tend to originate and send CLECs much more ISP-bound traffic than CLECs originate and send ILECS. At the other extreme ILECs tend to originate and send wireless carriers much less traffic than wireless carriers originate and send ILECs. Ameritech indicates that ISP-bound calls are much longer than the

³⁶ Id. at 25.

³⁷ Reply Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 7.

average “local” call, while wireless calls tend to be much shorter than the average “local” call.³⁸ In combination with Ameritech’s proposal to increase the per call reciprocal compensation rate and diminish the duration reciprocal compensation rate, these traffic patterns indicate that, if Ameritech’s rates were instituted and used both in this proceeding and on a going forward basis Ameritech will likely reduce its net payout of reciprocal compensation to its CLEC competitors and increase the net payments it receives from wireless carriers. This result cannot be ignored.

While Ameritech may be willing to assume the costs of moving to a bifurcated rate, it may be willing to do so because it receives benefits that exceed the benefits to XO or to society from such a change. The traffic patterns between Ameritech and XO indicate that Ameritech would likely pay less compensation to XO under its bifurcation proposal than it has in the past. Though this may benefit Ameritech by weakening XO’s business plan and reducing competitive pressure on Ameritech in Illinois, such benefits are offset to some degree by reductions in competition and subsequent harms to Illinois consumers. Therefore, costs may accrue not only to XO but also to Illinois consumers that Ameritech has not considered within its proposal.

Further, Ameritech will not be the only firm to incur costs. As Ameritech has argued in this proceeding, compensation terms and physical interconnection between networks may need alteration when traffic that has not been historically

³⁸ Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 11 and 12, respectively.

588 differentiated needs to be separated and identified for billing purposes. Although
589 I am not an engineer, I would presume that carriers would need to make some
590 modifications in their data extraction and billing systems in order to move from a
591 system of minute of use billing to a bifurcated system based on both minutes of
592 use and number of calls. No evidence exists on the magnitude of the costs of
593 such actions to either Ameritech or XO.

594
595 Without evidence that such a change improves economic efficiency or increase
596 the competitive nature of the Illinois marketplace the Commission should not
597 consider such a proposal. In explaining its ISP-Bound Traffic Order the FCC
598 stated, “[i]t would be unwise as a policy matter, and patently unfair, to allow
599 incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-
600 bound traffic, with respect to which they are net payers, while permitting them to
601 exchange traffic at state reciprocal compensation rates, which are much higher
602 than the caps we adopt here, when the traffic balance is reversed. Because we
603 are concerned about the superior bargaining power of incumbent LECs, we will
604 not allow them to ‘pick and choose’ intercarrier compensation regimes,
605 depending on the nature of the traffic exchanged with another carrier.” On the
606 surface, Ameritech’s current proposal results in a “pick and choose” outcome.
607 This certainly appears an attempt to circumvent both the FCC’s regulations and
608 the explicitly defined intent of those regulations. Staff’s concerns in this area
609 could be partially alleviated if Ameritech were to demonstrate that its proposed

610 rates where in fact reflective of its actual costs. As described below, however, all
611 evidence suggests precisely the opposite.

612
613 **Q. Ameritech Witness Panfil further asserts, “If the Commission believes the**
614 **time has come for Ameritech Illinois to revise its transport and termination**
615 **cost studies, Ameritech Illinois can certainly do that. But that is no reason**
616 **to hold off on making the change in reciprocal compensation rates that is**
617 **on the table in this arbitration. The fact of the matter is that one way or**
618 **another the parties are going to be paying each other reciprocal**
619 **compensation on what are now the most recent cost studies Ameritech**
620 **Illinois has had accepted by the Commission. The only question is whether**
621 **the parties will or will not apply a new, and better, rate structure.”³⁹ Please**
622 **evaluate this statement.**

623
624 **A.** Staff does not believe that Ameritech’s bifurcated solution is an unambiguous
625 movement toward rates more reflective of costs. Ameritech is purporting to
626 implement rates derived from its commission TELRIC costs in a manner that may
627 not have been contemplated in past TELRIC proceedings. Clearly, the overriding
628 purpose in such proceedings is to derive costs used to compute cost based
629 pricing. The fundamental concern for competitors, consumers and this
630 Commission is the price derived from such exercises. The rates for reciprocal
631 compensation have depended exclusively on the per-minute-of-use costs of

³⁹ Id. At 8.

providing traffic termination services. Therefore, it is not only conceivable, but also highly likely, that, given the virtually limitless number of steps making up Ameritech's cost studies, that very little scrutiny has been given to the separation of termination costs into setup and duration costs. Without such scrutiny, and given the dramatic effect such costs would have on bifurcated reciprocal compensation rates Staff cannot endorse their use for such purposes.

The limited evidence that is available is revealing. The following table contains the most recent TELRIC costs approved by the Commission and the most recent TELRIC costs filed by Ameritech for the reciprocal compensation rate elements Ameritech proposes to bifurcate. The Commission has not yet approved the latter rates.

Table 1: Ameritech Illinois TELRIC Cost Study Information ⁴⁰			
	TELRIC + Shared and Common Cost Filed 4/3/98		TELRIC + Shared and Common Cost Filed 4/5/00

⁴⁰ Ameritech's responses to JZ-IBT 2.1 and JZ-IBT 2.5 of Staff Data Requests JZ IBT 2.1-2.6 (attached as Appendix C).

End Office – Set Up	\$0.009512		
End Office -- Duration	\$0.000967		
Tandem – Set Up	\$0.000496		
Tandem -- Duration	\$0.000201		

648
649
650 This table shows that Ameritech's estimate of costs changed dramatically
651 between the two filings. Particularly revealing is the dramatic shift in end office
652 rates between setup costs and duration costs . If Ameritech's cost studies are to
653 be believed, this would seem to indicate that, while the Commission has not yet
654 approved new cost studies, Ameritech's rates no longer appropriately reflect its
655 costs.

656
657 Mr. Panfil notes other states in which Ameritech's SBC parented affiliates
658 operate, including California, Michigan, Texas and Wisconsin that have adopted
659 bifurcated rate structures.⁴¹ While it is Staff's understanding that bifurcated rates
660 in California and Wisconsin are not yet available, the following table indicates the
661 bifurcated rates in both Michigan and Texas (Staff understands that Texas
662 bifurcates end office rates but not tandem rates).

663

⁴¹ Direct Testimony of Eric L. Panfil On Behalf of Ameritech Illinois at 19..

Table 2: Cost Study Information for Michigan Bell and Southwestern Bell of Texas ⁴²			
	TELRIC + Shared and Common Cost Filed Michigan		TELRIC + Shared and Common Cost Filed Texas
End Office – Set Up	\$0.001855		\$0.001089
End Office -- Duration	\$0.000605		\$0.001042
Tandem – Set Up	\$0.000131		Non-Bifurcated
Tandem -- Duration	\$0.000234		Non-Bifurcated

As this table indicates, the setup costs filed in Ameritech's most recent TELRIC study are a much larger fraction of end office costs than they are for either Michigan Bell or Southwestern Bell. In addition, Michigan Bell has a bifurcated cost structure for tandem transport termination while Ameritech's TELRIC costs for Illinois do not make such a distinction. This is clearly an anomalous result that requires explanation.

The figures above certainly indicate reason to doubt that the figures in Ameritech's proposal accurately reflect the costs of providing such services in Illinois. As indicated above, however, if there were evidence that moving to a

⁴² Michigan Bell Telephone Company Tariff M.P.S.C. NO. 20R, Part 23, Section 2, 4th Revised Sheet No. 16 ("Michigan Bell Tariff"), Effective February 3, 2001 and Public Utility Commission of Texas Arbitration Award Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996 (Docket No. 21982), Attachment A.

675 bifurcated rate structure would produce societal benefits that exceeded the costs
676 of moving to such a structure and that the bifurcated rate levels adopted
677 accurately reflected Ameritech's current forward looking costs, then Staff would
678 support adoption of a bifurcated structure.

679

680 **Q. Does this conclude your testimony?**

681

682 **A. Yes.**

683

684